Office Supreme Court, U. S.
FILED
OCT 22 1927
CLERK

No. 78.

IN THE

Supreme Court of the United States

A. B. LEACH & CO., INC., Plaintiff-in-Error,

vs.

WALTER PEERSON, Defendant-in-Error.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR APPELLEE.

JOHN ARTHUR BROWN,
HENRY P. BROWN,
For Appellee.

INDEX

	Page
Brief for respondent	1
I. The certiorari should be dismissed because improvidently granted	1
II. None of the defendant's assignments of error in the circuit court of appeals should be sustained	9
Conclusion	22

TABLE OF CASES CITED

Allan v. Peters, 4 Phila. 78	5
Atlantic Coast Line R. R. v. Mims, 242 U. S. 532	3
Auringer v. Cochrane, 225 Mass. 273	20
Biggs v. Stincher, 36 Md. 300	14
Baker Perrine Co. v. Kelley, 243 Mass. 327	21
City of Chicago v. McKechney, 206 Ill. 372	14
Cosgrove v. Hunnicutt, 54 Pa. 268	6
Dempsey v. Dobson, 174 Pa. 125	4, 14
Fraley v. Bispham, 10 Pa. 320	4, 5, 14
Gifford v. Gifford, 244 Pass. 302	21
Glatfelter v. Mendels, 46 Pa. Super. Ct. 502	6
Gold Mining Company v. National Bank, 96 U. S. 640, at 644	17
Guertin Stone Company v. Cattle Construction Co., 248 U. S. 334, 338	12
Hershey v. Love, 278 Pa. 161	6
Jacobs v. Southern Railway Co., 241 U. S. 229, 230	12
Kann v. Bennett, 223 Pa. 36	5, 14
Kunde v. Fine, 226 Mass. 75	14
Lasse Bowler Corporation v. Western Webb Works, 261 U. S. 387	8
Leach v. Peirson, 16 Fed. (2d) 86, at 87	12
Louisville & Nashville R. R. Co. v. Parker, 242 U. S. 13	3
Marino v. Vecchio, 85 Pa. Super. Ct. 377	14
McDermott v. Severe, 202 U. S. 600, 610	12
McNally v. 301 Madison Ave. Corp., 211 N. Y. S. 25	14
Morris v. Hanely, 3 Fed. (2d) 907	18
Morris v. Norton, 75 Fed. Rep. 912	20
Norfolk & Western Ry. Co. v. Earnest, 229 U. S. 114, 120	12
Parker v. United States, 166 Fed. 966	14
Pennsylvania R. R. Co. v. Minds, 250 U. S. 368	12

	Page
Philadelphia etc. R. R. Co. v. Cowell, 28 Pa. 329	7, 17
Sievers v. Coal Co., 158 Iowa, 524	14
Selig v. Belfuss, 196 Pa. 200	6
State v. Howell, 61 N. J. L. 142	14
State Bank v. Mosely, 135 Mich. 429	14
Sturtevant v. Wallack, 141 Mass. 119	20
Thrush v. Fullhart, 230 Fed. 1	14
United States v. U. S. Fidelity Co., 236 U. S. 512, 529	12
Vicle v. McLean, 206 N. Y. 260	14
Woodley v. Haynes, 165 Fed. 201	14

TEXT BOOKS CITED

Mechem on Agency, Vol. I, Sec. 454	16
Sec. 830	19
Story's Agency, Sec. 80	18
Williston on Contracts, Sec. 278	16

OTHER AUTHORITIES CITED

2 Corpus Juris, 648	16
69, Sec. 116	19
3 Corpus Juris, p. 725, Sec. 459	5

In the Supreme Court of the United States.

OCTOBER TERM, 1927. No. 78.

A. B. Leach & Co., Inc., Plaintiff in Error,

vs.

Walter Person, Defendant in Error.

ARGUMENT.

I.

The Certiorari Should Be Dismissed Because Improvidently Granted.

The petition for the certiorari was based on the diversity of judgments of the several Circuit Court of Appeals as to whether or not the Conformity Acts apply to the state rules of evidence.

It is contended by plaintiff in error that the trial Judge committed an error in admitting evidence a certain letter written and mailed by defendant in error hereinafter called plaintiff to plaintiff in error hereinafter called defendant

and admitted for the plaintiff over the defendant's objection. Defendant contended the letter was self-serving and therefore inadmissible when offered by the plaintiff, under the law of evidence as administered generally throughout the United States and England. Neither in the District Court nor in the Circuit Court of Appeal was it suggested by defendant that there was a special rule of law provided by statute or legal decision in Pennsylvania relating to the admissibility of self-serving statements, and that such state rule or law was binding upon a federal court sitting in Pennsylvania. In its brief of argument (p. 17), in the Circuit Court of Appeals defendant contended that the letter was inadmissible under the "Universally Settled" rule of law regarding self-serving statements. In support of its claim that the rule was "universally settled" defendant's brief of argument in the Court of Appeals quoted from decisions in the different jurisdictions in the following order: 6 federal cases, 3 from Pennsylvania, 5 from England, 6 from Massachusetts, 8 from New York, 2 from Illinois, 2 from New Jersey, and 7 from other states. There was no suggestion that the Pennsylvania cases established or exhibited any special local rule which under the Conformity Acts was binding on federal courts sitting in Pennsylvania. They were cited with 34 cases from other jurisdictions in support of a general rule of the law of evidence which it was claimed by defendant the trial Court had refused to apply when admitting in evidence the self-serving letter.

It is not without significance that when defendant came to prepare its brief in this Court it did not follow its practice in the courts below in the manner of citing cases on the subject of self-serving letters. Instead the Pennsylvania cases were cited in support of a Pennsylvania rule and cases on the same subject in other jurisdictions were placed under the special heading "additional cases on self-serving letters unanswered."

It appears to be well settled that the defendant cannot raise in this Court a question of law not raised in the District Court nor in the Circuit Court of Appeals.

Louisville & Nashville Railroad Company vs. Parker, administrator, etc., 242 U. S. page 13.

In that case the defendant failed to raise in the trial court the applicability of the Federal Employers Liability Act. The case went to the jury as one dependent on the State law and there was a verdict which admittedly could not be sustained if the Federal Employers Liability Act applied.

The failure of the Court to apply the Federal Employers Liability Act was made the ground of appeal to this court. In sustaining the verdict, this Court held that as the defendant had not raised the question of the applicability of the act in a proper manner nor had made any request or objection in the trial court which was not rightly overruled, the defendant could not raise in this court the applicability of this act.

Atlantic Coast Line Railroad vs. Mims, administratrix, 242 U. S. 532, the same question was considered, and it was held that this court was without jurisdiction to review the judgment of a State court upon the ground that a Federal right was denied, when the claim of Federal right relied on was refused consideration in the State court because it was not asserted at a proper time or in a proper manner under the established State system of pleading and practice.

The same principle is stated in 3 Corpus Juris, page 723, Section 619:—

> "When a case is tried by both parties upon the theory that the law of the forum governs, a party cannot, on appeal, take the position that the laws of another State should have been applied. And, where the trial is had in accordance with State law, it cannot be urged for the first time, on appeal, that a Federal statute should govern."

If the defendant had raised in the District Court or in the Court of Appeals the question of the duty of federal

courts under the Conformity Acts to apply local state rules of evidence, neither the cases cited nor any other cases in Pennsylvania can be found to support the statement that in Pennsylvania there is a settled rule of law that under no circumstances and for no purposes is a letter written by the party offering it to the opposite party admissible, if it contains any matters of a self-serving character and is unanswered.

All that the Pennsylvania cases cited by defendant decide is that *upon the facts of those cases* the letter offered in evidence by the writer was not admissible. A statement of these Pennsylvania cases cited by defendant, follows:

> In **Fraley vs. Bispham,** 10 Pa. 320, in a suit by a vendee against a vendor of goods, the former offered in evidence a letter written by him to the vendor, charging that by reason of a breach of warranty as to the character of the goods, the plaintiff had suffered a certain money loss and requesting payment of this sum. In sustaining the exclusion of this letter the Supreme Court said:—
>
> "I regard the paper as nothing more than a specification of damages, sustained upon an alleged breach of contract on the part of the defendant, of which the defendant was bound to take no notice, by the usages of trade, or mercantile law."

In **Dempsey vs. Dobson,** 174 Pa. 123, one employed by defendant to experiment with colors and to record his results in a "color book," sued to recover a copy of the book which defendant had made after the termination of the employment. The Court below admitted in evidence a letter written by plaintiff to defendant of which the Supreme Court said:—

> "It was an argumentative presentation of his view of his rights as an employee and of the grievance of

which he complained. It was unanswered. It was the declaration of the plaintiff in his own behalf and was no more admissible because reduced in writing than it would have been if delivered orally. The point is substantially ruled in Fraley *vs.* Bispham, 10 Pa. 320."

In **Kann vs. Bennett,** 223 Pa. 36, an owner sued a contractor on a building contract alleging improper delay in performance and a loss on completion of the work by the plaintiff. At the trial the plaintiff was allowed to put in evidence letters written by plaintiff's architect and agent to the defendant, in which were set forth at length the defendant's default and a threat to resume possession of the premises and complete the work. The Supreme Court said:—

"They set forth an argumentative presentation of the plaintiff's contention, and there seems to be nothing in the record to show that they were actually received, or were ever replied to in any manner by the defendant. The letters therefore amounted to nothing more than declarations in his own behalf, and as such they should not have been admitted in evidence."

In its brief filed in this Court, the defendant quotes (on page 25) from the decision in the case of **Allan vs. Peters,** 4 Phila. 78.

In that case the Court held that an unanswered self-serving letter will be admitted in evidence to show a demand or notice if one of these be requisite, and the statements do not go beyond what is necessary to render the demand or notice intelligible. In other words an unanswered letter by one party to another is not made inadmissible by a self-serving statement contained therein if such letter served any necessary and proper function in the proof of the case of the party offering it.

At this point in the argument, it may be remarked that it is not necessary for plaintiff to contend that under the facts in the case at bar the letter was admissible either under the Pennsylvania decisions or under the rule to be deduced from the decisions generally. In this jurisdictional section of the argument it is submitted that it is enough to show that there is no absolute, inflexible rule in Pennsylvania as contended by defendant by which every unanswered letter is rendered inadmissible for the writer, regardless of the purpose for which it was offered or the other facts and circumstances in the case.

The following Pennsylvania cases deal with the admissibility of such a letter.

In **Hershey vs. Love,** 278 Pa. 161 (a case not cited by counsel for the defendant), the Supreme Court of Pennsylvania distinguished the case before it from several others in which unanswered self-serving letters were admitted in evidence in the higher courts of that State upon different states of fact. The Supreme Court said (p. 164):—

> "Situations do arise, where correspondence is admissible, though phrases appear therein favoring the contention of the one presenting it, as in the case of the production of a letter necessary to show a demand for payment (Crossgrove vs. Himmelrich, 54 Pa. 203), return of property claimed (Glattfelter vs. Mendels, 46 Pa. Super. Ct. 502), or requesting the other party to take certain steps legally required. Selig vs. Rehfuss, 195 Pa. 200."

In **Crossgrove vs. Himmelrich,** supra (54 Pa. 203), in a suit to recover the consideration paid to defendant under a contract, a letter written by plaintiff to defendant giving him written notice of rescission and stating the facts as to the contract, payment and breach, was admitted in evidence for the plaintiff. The Supreme Court said of this letter:—

> "The objection was that it contained declarations of the plaintiffs in their own favor. Suppose it did,

it was made to the faces of the defendants, and not behind their backs, and they might have denied the truth of any declaration in it and required proof if they thought proper."

No decision in Pennsylvania can be found which undertakes to set forth all the conditions under which and purposes for which unanswered self-serving letters may be given in evidence for the writer. The only warranted deduction from the Pennsylvania cases cited by the appellant or any other cases to be found in that jurisdiction, is that upon the facts in some cases such letters were held inadmissible, while in other cases, where the facts were different, and the purposes of the proof were different, the letters were held admissible. Therefore any general rule in Pennsylvania decisions relating to the exclusion of self-serving letters is too general and vague and requires too much in the way of interpretation and application to the facts, to require a Federal Court sitting in that State to recognize and apply it under the Conformity Acts.

In a later portion of this brief it will be shown that the fundamental question in the case at bar is one of agency, and that the rule of evidence is incidental to and dependent upon that question. If a principal advised of an unauthorized exercise of his agent's authority, is required to repudiate his act and restore the consideration he has received, such letter may be received to show notice, and the fact that in giving such notice the letter necessarily states facts favorable to the writer cannot render it inadmissible.

The case of **Phila. etc. R. R. Co. vs Cowell,** 28 Pa. 329, in allowing a jury to find a ratification by silence after one has been informed that another without authority has assumed to act on his behalf, completely disposes of defendant's argument that under the Pennsylvania decisions there can be no ratification inferred from the silence of the receiver of a letter addressed to him by the party offering it.

The argument to be made later in this brief is anticipated and the Cowell case is cited merely to show that the admissibility of the letter of May 9 and its effect cannot be determined by applying directly under the Conformity Acts any general rule of evidence of the state court.

It is, therefore, submitted that it is not necessary to consider whether there is a diversity of decisions in the different circuit courts on the question whether the Conformity Acts require federal courts in common law trials to follow the rules of evidence of the state courts in which the trial is held, because

(1) In the District Court no attempt was made to show a local rule of evidence binding on that Court, and no assignment of error in the Circuit Court of Appeals was taken to the failure to follow the rule of evidence of the local court; and

(2) Even if the decisions of Pennsylvania courts had been cited by defendant in support of a distinctive local rule of evidence, these cases fail to show any such rule.

It is, therefore, submitted that the certiorari granted in this case should be dismissed as was done in **Layne Bowler Corporation vs. Western Webb Works,** 326 U. S. 58.

In that case after a writ of certiorari had been allowed by this court to settle a supposed conflict of decisions between two circuit courts of appeals concerning the validity and scope of a patent, after the filing of briefs and argument, in an opinion by the present Chief Justice, this court upon consideration held that the writ of certiorari had been improvidently granted because such conflict did not exist. The writ of certiorari was therefore dismissed without consideration of the merits of the case.

II.

None of the Defendant's Assignments of Error in the Circuit Court of Appeals Should be Sustained.

If this Court declines to dismiss the *certiorari* as improvidently granted and the case is heard on the assignments of error filed in the Circuit Court of Appeals, it becomes necessary to determine which of those assignments were properly taken and can therefore be made the subject of defendant's argument before this Court. This requires a summary statement of the undisputed facts and the testimony in the District Court.

On three separate occasions between June, 1920, and February, 1921, plaintiff purchased from defendant different bonds. In each case the order to purchase was procured through the same salesman, Mather, an employee of defendant, and each order was given in reliance upon Mather's agreement at the time, that if at any time the plaintiff so desired, the defendant would take back the bonds at the purchase price (R. 10, R. 19, R. 24).

In May, 1921, plaintiff, finding he could not use some of these bonds as collateral, mailed to defendant the following letter (R. 36):—

"May 6, 1921.

"*Messrs. A. B. Leach & Co., 115 South 4th St., Philadelphia.*

"Dear Sirs:—When I purchased from you the Mass. Oil & Ref. Co. Bonds it was agreed by Mr. Mather if at any time I so desired you would take them off my hands at cost 98.

"I have need of some money and will avail myself of this privilege.

"When shall I deliver them to you.

"Very truly yours,

"WALTER PEIRSON."

The following day May 10, 1921, Mather called the plaintiff on the telephone (R. 37), and when plaintiff informed him of his difficulty, Mather said that the bonds were "as good as wheat," and that defendant would make a loan on them (R. 37). The next day May 11, 1921, defendant did lend plaintiff $15,000 on the security of the bonds at a face value of $20,000 (R. 37). At this time the bonds had not depreciated in value (R. 108). This was the only time defendant had ever loaned money to any of Mather's customers (R. 98).

In March, 1922, when plaintiff received a demand for repayment of the loan he called Mather on the telephone and the latter said that the demand was only a matter of form and that the loan should be allowed to run (R. 41-42).

When in April, 1922, plaintiff received a second demand he mailed to defendant the following letter on April 21, 1922 (R. 44):—

"APRIL 21, 1922

"*Mess. A. H. Leach & Co., 115 South 4th St., Philadelphia.*

"DEAR SIR:—When the 20,000 Massachusetts Oil & Refining Bonds were bought from you it was expressly agreed that at any time I desired, you would take them off my hands at cost.

"This I now ask you to do, calculate the interest deduct the loan and mail me check for balance due.

"Very truly yours,

"WALTER PERSON."

The next day, when plaintiff demanded of the defendant's vice-president Miller that all the bonds be taken back in accordance with Mather's agreement, Miller said that "Mather denied ever having made such an agreement" (R. 44).

On July 14, 1922, plaintiff made a formal written demand on defendant to retake all the bonds. Suit was

brought to recover the difference between the purchase price of the bonds and their market value on this date.

At the trial, against defendant's objection that the letter of May 9, 1921, was self-serving, the Court admitted it in evidence (R. 36). This was the only objection made by defendant to its admission.

The only request for charge made by defendant at the trial was for a directed verdict, and this was refused (R. 133).

There was a verdict for plaintiff for the amount claimed of $14,726.25, after allowing defendant credit for the loan of $15,000 with interest thereon (R. 1-8, 130).

In the Circuit Court of Appeals defendant assigned for error (R. 141):

1. The Court's overruling defendant's objection to the offer of proof of the letter of May 9, 1921;

2. The admission of this letter;

3. The refusal of a directed verdict;

4. The Court's instructions that the defendant's receipt of the letter of May 9, 1921, would be notice of Mather's agreement, and a failure to deny the latter's authority or that he made such agreement would justify an inference of acquiescence in what he had done; and

5. The Court's refusal to order plaintiff to produce his income tax returns.

In the brief filed in this Court (p. 8), in the "specifications of error intended to be relied upon," appellant names:

1. The admission of the letter of May 9, 1921;

2. The refusal of binding instructions;

3. The admission of the letter of May 9, 1921, and the Court's instruction to the jury thereon, including the Court's failure to notice in such instruction the fact that the letter related to only one of the three purchases of bonds; and

4. The entry of judgment for the plaintiff and against the defendant.

It is submitted that only the first two errors specified are available to the appellant. At the trial the only exception taken by defendant to the charge of the trial Court was the refusal to direct a verdict for the defendant. The defendant at that time withdrew all its requests for charge except the request for binding instructions (R. 133, R. 126).

This request for binding instructions did not amount to more than a general exception to the charge of the trial court. It is well settled that such an exception is insufficient and that exceptions to the charge of the trial Judge must be specific in order that a trial court may be given an opportunity to correct errors and omissions before the same are made the basis of error proceedings —

Pennsylvania Railroad Company vs. Minds 250 U. S. 368. Mr. Justice Day there said, page 375 —

> "This court has repeatedly held that objections to the charge of a trial judge must be specifically made in order that he may be given an opportunity to correct errors and omissions himself before the same are made the basis of error proceedings; this is the only course fair to the court and the parties. McDermott v. Severe, 202 U. S. 600, 610; Norfolk & Western Ry. Co. v. Earnest, 229 U. S. 114, 120; United States v. U. S. Fidelity Co., 236 U. S. 512, 520; Jacobs v. Southern Ry. Co., 241 U. S. 229, 230; Guerini Stone Co. v. Carlin Construction Co., 248 U. S. 334, 338. Parties may not rest content with the procedure of a trial, saving general exceptions to be made the basis of error proceedings, when they might have had all they were entitled to by the action of the trial court had its attention been seasonably called to the matter."

At the close of the opinion in the Circuit Court of Appeals (**Leach vs. Peirson,** 16 Fed. (2nd) 86, at page 87) Judge Buffington said (R. 140) —

> "We may add that we have not overlooked the fact that the court in admitting the letter did not limit its

effect to the bonds mentioned therein, but as such point was not raised either in objections to testimony or exceptions to charge, the matter is not before us for review."

The only questions therefore to be considered are (1) the admissibility of the letter of May 9, 1921, and (2) the failure of the Court to direct a verdict for defendant.

There was no error in admitting in evidence the letter of May 9, 1921, nor in holding that defendant's failure to reply to it, under the facts in the case, was some evidence from which the jury might find ratification of the contract of repurchase made by defendant's agent Mather.

The defendant contended that the letter was self-serving and that all self-serving letters were inadmissible, and that irrespective of the circumstances there was no duty on the part of the defendant to reply, and therefore the jury had no right to draw any unfavorable inference from its failure to do so.

This argument does not discriminate between a self-serving letter written after the transaction is closed and one written in the course of the transaction; between a letter making a demand or giving some other information necessary to preserve the rights of the writer, and an argumentative demand to redress an alleged wrong. Neither does defendant's argument take into consideration the situation of the parties, and whether, after the defendant had received the information contained in the letter, any legal consequences attended its failure to reply or its failure to take some action.

The cases cited by defendant do not make these distinctions because they were not called for by the facts in those cases.

The cases cited by defendant may be divided into several groups.

(1) Where the letters were written after the contract had been fully performed or the transaction closed, and in some of these cases this fact was referred to by the Court as the ground of exclusion.

The letter was written subsequent to the close of the transaction in **Fraley vs. Bispham,** 10 Pa. 320; **Dempsey vs. Dobson,** 174 Pa. 123; **Kann vs. Bennett,** 221 Pa. 80; **Packer vs. U. S.** 166 Fed. 666; **Woolsey vs. Haynes,** 165 Fed. 901; **Thrush vs. Fullhart,** 210 Fed. 1.

(2) In the following cases the fact was referred to that the letter contained an argumentative presentation of the writer's case against the other party. **Dempsey vs. Dobson,** 174 Pa. 122; **Kann vs. Bennett,** 221 Pa. 80; **Viele vs. McLean,** 200 N. Y. 266; **City of Chicago vs. McKechney,** 205 Ill. 472.

(3) In other cases the letters were excluded because their only purpose was to inform the receiver that if he did not accede to the writer's demands he would be held liable. **Kumin vs. Fine,** 229 Mass. 75; **State vs. Howell,** 91 N. J. L. 142; **Biggs vs. Stueler,** 91 Md. 106; **Seevers vs. Coal Co.,** 158 Ia. 574; **State Bank vs. McCabe,** 148 Mich. 470; **Marino vs. Vecchio,** 81 Pa. Super. Ct. 377; **McNally vs. 301 Madison Ave. Corp.,** 211 N. Y. S. 25.

It is not contended by plaintiff that all self-serving letters unanswered are admissible in evidence, or that the receiver's failure to answer every letter addressed to him by his opponent can be taken by the jury as an admission of the truth of the matters contained in it. It is contended by plaintiff that when a letter is written in the course of the performance of a contract, to enable the writer to avail himself of some right under the contract, or to give some notice that may be necessary to establish his claim in court, or meet some defense raised against his claim, such letter is admissible for the writer if its terms do not go beyond the demand or notice with the explanation necessary to render it intelligible. The effect of this notice or demand

will depend on the substantive law applicable to the facts of the case and the situation of the parties.

It is submitted that the letter at bar was not purely self-serving. At the time it was written there was no breach, not even a controversy between the parties; it was written to secure performance of the contract; there is nothing in it to suggest that it was written by the plaintiff with a view of making evidence for himself, nor was there anything to indicate that it was used at the trial to enable the plaintiff to have the benefit of his statement out of court, of the contract made with the agent, Mather. There had been sufficient proof of Mather's making the agreement.

We, therefore, contend that the letter of May 9, 1921, is not inadmissible under the authorities cited for appellant.

The facts of the case and the situation of the parties which are relied upon to sustain the admission of the letter and also its subsequent use when unanswered as evidence of ratification, are as follows:—

The plaintiff had paid for bonds purchased from defendant on the faith of an agreement made with its agent. Before any breach and to avail himself of the benefit of this agreement, plaintiff sent the letter. When the defendant received the letter it learned of the conduct of its agent. While the letter called for performance of the agent's agreement, such performance did not impose any greater liability on defendant than a rescission of the contract. The bonds in question had not depreciated at that time. Without any loss to itself, defendant could have retaken the bonds at the purchase price. By its silence on this subject and making the plaintiff the loan on the bonds, the defendant deferred meeting the issue as to whether the agent had authority to make the agreement. If plaintiff had failed to prove that defendant had notice of its agent's agreement until after the bonds had depreciated in value, defendant could have set up by way of defense that it was not bound to allow a rescission of the sale on such terms as would impose a loss on it. There-

fore, it became necessary for plaintiff to show notice of the agent's agreement and the terms of such notice.

The duty of the defendant on receiving the letter was then determined by the law of agency. Its silence was some evidence of ratification.

In **Williston on Contracts,** Sec. 278, it is said —

> "Ratification like original authority need not be express. Any conduct which indicates assent to the transaction is sufficient. Even silence with full knowledge of the facts may operate as a ratification. The person with whom the agent dealt will so obviously be deceived by assuming the professed agent was authorized to act as such, that the principal is under a duty to undeceive him."

In **Mechem on Agency,** Vol. 1, Sec. 454, it is said —

> "But even though silence may not be *per se* conclusive, and even though estoppel be for the time being excluded, it is entirely safe to say that silence or a failure to repudiate may often be evidence of an assent, more or less strong under the circumstances, from which as a matter of fact, an inference of assent may be drawn. The question seems to be this: From the failure to dissent under the circumstances, would the ordinarily intelligent man be justified in inferring that the principal assented? Like other similar questions, this would be for the jury unless reasonable men could fairly draw only one inference from the facts, and in that case the court may decide it."

In **2 Corpus Juris,** 508, it is said —

> "Mere silence or delay on the part of a principal in repudiating the unauthorized act of an agent does not necessarily amount to a ratification, but while it is not necessarily conclusive evidence of a ratification,

unless it cannot be explained on any other theory, it is always an element to be considered in connection with other evidence tending to show a ratification, and may alone be sufficient to justify a finding of ratification, particularly where the circumstances impose a special duty upon the principal to speak, as where the other party is liable to be misled or injured by his failure to do so."

In **Gold Mining Co. vs. National Bank,** 96 U. S. 640 at 644 the Supreme Court said:—

"That if acts have been done by an agent in excess of his authority, and the principal on being informed of them fails to disavow them in a reasonable time, his silence may be considered as an acquiescence in and assent to the acts done."

In **Phila., Wilmington and Baltimore R. R. Co. vs. Cowell,** 28 Pa. 329, a director of a railroad company subscribed for new stock in the company for one who was already a large holder of stock in the company and who was living abroad at the time, and immediately notified him of the subscription. The latter never made any reply either to the railroad company or to the one who had thus acted on his behalf. Accruing dividends on the original stock were applied by the company to the payment of the stock subscription. Seven years afterward he demanded these dividends and sued for their recovery, alleging that the stock subscription was unauthorized. These facts were contained in an offer of proof which was rejected and a verdict was directed for the plaintiff. In reversing, the Supreme Court said (p. 330):—

"The most material circumstance in the offer was the silence of Mr. Cowell. Fully informed about the last of the year 1848 as to what had been done in his name, and the motives and reasons for doing it, he did not condescend to reply for nearly seven years.

It is insisted that this fact even when taken in connection with the other circumstances in the offer, was no evidence of his intention to assent to the new subscription.

"'It is a clear principle of equity that where a man stands by knowingly, and suffers another person to do acts in his own name without any opposition or objection, he is presumed to have given authority to do those acts. *Semper, qui non prohibet pro se intervenire, mandare creditur.* Story's Agency, Sec. 87.

"'We do not apply the full strength of this principle when we rule that the party's silence, in connection with the circumstances offered, was evidence fit for the consideration of a jury on the question of ratification. If mental assent may be inferred from circumstances, silence may indicate it as well as words or deeds. To say that silence is no evidence of it, is to say that there can be no implied ratification of an unauthorized act, or at least to tie up the possibility of ratification to the accident of prior relations. Neither reason nor authority justify such a conclusion. A man who sees what has been done in his name and for his benefit, even by an intermeddler, has the same power to ratify and confirm it that he would have to make a similar contract for himself, and if the power to ratify be conceded to him, the fact of ratification must be provable by the ordinary means.'

In **Morris vs. Handy,** 3 Fed. (2nd) 67, there was some evidence that defendant's president and also its manager knew that its agent without authority had purchased merchandise in its name, and that without knowledge of all the facts its manager had given a formal ratification. With this knowledge there was no disaffirmance for some days. Held by the Circuit Court of Appeals, that it was for the jury to say whether this conduct amounted to ratification.

Again, when defendant received the letter, if he did not approve and accept his agents contract, it was his duty to inform the plaintiff, and return the consideration and take back the bonds, for this is all the letter called for. Ratification was therefore to be inferred from the failure to restore the consideration.

In **Mechem on Agency,** Vol. 1, Sec. 430, it is said:—

> "When the principal discovers that there has come into his hands the proceeds of an unauthorized act of one who assumed therein to act as his agent, to voluntarily retain such proceeds is ordinarily to ratify the act."

In this case there was evidence on the part of the defendant that the bonds were still selling in May, 1921, for the price plaintiff paid for them. Therefore there was no change in the circumstances such as would excuse the defendant from restoring the consideration. (Sec. 430 and 439.)

In **2 Corpus Juris** 406, Sec. 116, it is said:—

> "The rule of ratification by the acceptance of benefits implies the power of election to accept or reject what has been received, and when the principal has suffered no prejudice and can make restitution, he should, when apprised of the facts, make his election, and if he decides not to ratify he should return the fruit of the unauthorized act, and if he does not do so within a reasonable time, but retains, uses or disposes of what he has received, he will be held to have ratified the act of the agent."

In support of the text many cases are cited from the different state courts.

In the same section it is also said —

> "This rule applies notwithstanding a previous denial, upon learning the facts, of the agent's authority, or expressions of disapproval or repudiation of his acts."

Some of the cases support a broader rule for the effect of a charge contained in an unanswered letter, and the rule is said to be that "where a charge is of such a kind that according to the common experience a man would naturally repudiate it, if unfounded, the fact that it was made and not repudiated may be left to the jury." This quotation is from the opinion of Holmes, J., in **Sturtevant vs. Wallack,** 141 Mass. 119.

In the above case, suit was for the price of a machine which was to be used in a building erected by the defendant. The machine had been ordered by a third person on defendant's account and the issue was his authority so to do. There was evidence that the machine was shipped to defendant distinctly marked with his address and bills were repeatedly sent to him and a letter demanding payment, to all of which he made no reply. Held, that this evidence was properly left to the jury.

In **Morris vs. Norton,** 78 Fed. Rep. 910, Lurton, J., said that while

> "unanswered statements in letters are seldom to be regarded as admissions by the person addressed, exceptional circumstances may justify the court in submitting them to the jury with a proper caution."

In **Auringer vs. Cochrane,** 228 Mass. 273 (1917), a dressmaker furnished gowns to defendant's minor daughter on the orders of the latter's wife. At the end of the month he sent a letter and a bill and received no reply. At the end of the second month he sent a second letter and a bill including items for the purchases in that month; and receiving no answer, at the end of the third month a third bill and letter were sent and receiving no answer, plaintiff wrote to defendant demanding an answer and settlement.

Sitting without a jury the Court found for the plaintiff. In overruling exceptions, the Supreme Court said:—

> "The letters were admissible. They were not under the circumstances self-serving declarations, but statements of the defendant's contractual relations to them, which rested on the statements of his wife."

In **Boice-Perrine Company vs. Kelley,** 243 Mass. 327 (1923), plaintiff's salesman who had sold goods to defendant, received less than the full amount in payment and receipted the bill. Afterward, plaintiff's bookkeeper sent a bill to defendant and on being told of the payment to the salesman, said that the sending of the bill was a mistake. Nothing further was done for several months when payment was demanded. A verdict was directed for plaintiff. In ordering a new trial, the Supreme Court said (p. 330):

> "There was evidence from which ratification by the plaintiff of the unauthorized act of its agent might have been inferred. Although it is somewhat slender, the case should have been submitted to the jury upon this point. It is the instant duty of a principal, upon ascertaining the facts, at once to disaffirm an act done in his name by an agent in execution of a power conferred but not in a mode sanctioned by the terms of the agency or in excess or misuse, of the authority given. Prompt disavowal of such an act is imperative because the inference of authority flows readily from the trust reposed by a principal in his agent. Harm to the victim of such unauthorized conduct of an agent may be repaired or mitigated by immediate knowledge of the denial of responsibility by the principal."

Gifford vs. Gifford, 244 Mass. 302, was an action by a wife against her husband for separate maintenance. The husband offered in evidence a letter written by him in which he asked his wife to live with him, that his means were reduced so that if she re-

maimed away from him he could afford only a small weekly payment. The trial court rejected the letter, but this was held error because it bore directly on the issue in the case.

In conclusion it is submitted

(1) The certiorari should have been dismissed because improvidently granted.

(2) The defendant has not, by objection to testimony or exceptions to charge, raised the question of limiting the letter of May 9, 1921, to the Massachusetts Oil Co. Bonds, and therefore this is not before this court for review.

(3) There was no error in admitting in evidence the letter of May 9, 1921, nor in holding that defendant's failure to reply to it, under the facts in this case, was some evidence from which they might find ratification of the contract of repurchase made by defendant's agent Mather.

It is, therefore, respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

JOHN ARTHUR BROWN,
HENRY P. BROWN,
For Appellee.